

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION**

JAMIE OWEN NIX,)	
)	
Plaintiff,)	
)	
v.)	No. 1:11CV68 SNLJ
)	
CARL HEFNER, et al.,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

This matter is before the Court upon the motion of Jamie Nix (registration no. 1201716), an inmate at Moberly Correctional Center, for leave to commence this action without payment of the required filing fee [Doc. #2]. For the reasons stated below, the Court finds that plaintiff does not have sufficient funds to pay the entire filing fee and will assess an initial partial filing fee of \$2.24. See 28 U.S.C. § 1915(b)(1). Furthermore, based upon a review of the complaint, the Court finds that the complaint should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B).

28 U.S.C. § 1915(b)(1)

Pursuant to 28 U.S.C. § 1915(b)(1), a prisoner bringing a civil action in forma pauperis is required to pay the full amount of the filing fee. If the prisoner has insufficient funds in his or her prison account to pay the entire fee, the Court must assess and, when funds exist, collect an initial partial filing fee of 20 percent of the

greater of (1) the average monthly deposits in the prisoner's account, or (2) the average monthly balance in the prisoner's account for the prior six-month period. After payment of the initial partial filing fee, the prisoner is required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. 28 U.S.C. § 1915(b)(2). The agency having custody of the prisoner will forward these monthly payments to the Clerk of Court each time the amount in the prisoner's account exceeds \$10, until the filing fee is fully paid. Id.

Plaintiff has submitted an affidavit and a certified copy of his prison account statement for the six-month period immediately preceding the submission of his complaint. A review of plaintiff's account indicates an average monthly deposit of \$11.20, and an average monthly balance of \$1.25. Plaintiff has insufficient funds to pay the entire filing fee. Accordingly, the Court will assess an initial partial filing fee of \$2.24, which is 20 percent of plaintiff's average monthly deposit.

28 U.S.C. § 1915(e)

Pursuant to 28 U.S.C. § 1915(e)(2)(B), the Court must dismiss a complaint filed in forma pauperis if the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief. An action is frivolous if it "lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 328 (1989); Denton v. Hernandez, 504 U.S.

25, 31 (1992). An action is malicious if it is undertaken for the purpose of harassing the named defendants and not for the purpose of vindicating a cognizable right. Spencer v. Rhodes, 656 F. Supp. 458, 461-63 (E.D.N.C. 1987), aff'd 826 F.2d 1059 (4th Cir. 1987). A complaint fails to state a claim if it does not plead “enough facts to state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

The Complaint

Plaintiff brings this action under 42 U.S.C. § 1983. Named as defendants are Carl Hefner (Sheriff, Stoddard County), John Spence (Correctional Officer, Stoddard County Jail) Larry Gully (same), Jackie Hayes (same), Stoddard County, and the Stoddard County Sheriff's Office.

Plaintiff alleges that he was arrested on August 31, 2009, and was detained in the Stoddard County Jail (the “Jail”). Plaintiff claims that he was on medications for back pain, high blood pressure, and anxiety at the time. Plaintiff did not arrive with his medications, and he says defendant Spence told plaintiff to have his family call in his prescriptions to a pharmacy in Bloomfield, Missouri. Plaintiff did, and Spence picked up the medications. Plaintiff claims that Spence then informed him that he would not be getting any of his medications; Spence said he talked with defendant

Hefner, who told Spence plaintiff could not have his medications because he was a “dope head.”

Plaintiff alleges that the following day he was experiencing high blood pressure. Plaintiff says he told defendant Gully he thought he was having a heart attack and Gully replied, “Too bad, kid.” Plaintiff claims that he beat on his cell door until Spence arrived; plaintiff states that Spence just laughed at him and told him to file a grievance.

Plaintiff maintains that he got very ill, to the point where he could not urinate for periods as long as a week. Plaintiff repeatedly requested to be taken to the hospital.

Eventually, says plaintiff, he was taken to see a doctor. Plaintiff states that he told the doctor that he had severe kidney pain. Plaintiff claims that the doctor gave him lisinopril for his blood pressure. Plaintiff told the doctor he was allergic to lisinopril, but that the doctor told him that was nonsense.

Plaintiff was later taken into custody by the Missouri Department of Corrections. Plaintiff alleges that upon his arrival at the Eastern Reception, Diagnostic and Correctional Center, he was informed that he was in kidney failure.

Discussion

The complaint is silent as to whether defendants are being sued in their official or individual capacities. Where a “complaint is silent about the capacity in which [plaintiff] is suing defendant, [a district court must] interpret the complaint as including only official-capacity claims.” Egerdahl v. Hibbing Community College, 72 F.3d 615, 619 (8th Cir. 1995); Nix v. Norman, 879 F.2d 429, 431 (8th Cir. 1989). Naming a government official in his or her official capacity is the equivalent of naming the government entity that employs the official. Will v. Michigan Dep’t of State Police, 491 U.S. 58, 71 (1989). To state a claim against a municipality or a government official in his or her official capacity, plaintiff must allege that a policy or custom of the government entity is responsible for the alleged constitutional violation. Monell v. Dep’t of Social Services, 436 U.S. 658, 690-91 (1978). The instant complaint does not contain any allegations that a policy or custom of a government entity was responsible for the alleged violations of plaintiff’s constitutional rights. As a result, the complaint fails to state a claim upon which relief can be granted as to defendants Hefner, Spence, Gully, Hayes, or Stoddard County.

Plaintiff’s claim against the Stoddard County Sheriff’s Department is legally frivolous because the Sheriff’s Department is not a suable entity. Ketchum v. City

of West Memphis, Ark., 974 F.2d 81, 81 (8th Cir. 1992) (departments or subdivisions of local government are “not juridical entities suable as such.”).

For these reasons, the complaint is subject to summary dismissal under 28 U.S.C. § 1915(e). Because the allegations in the complaint are serious and plaintiff is proceeding pro se, however, the Court will allow plaintiff to file an amended complaint. Plaintiff shall have thirty days from the date of this Order to file an amended complaint. Plaintiff is warned that the filing of an amended complaint replaces the original complaint, and claims that are not realleged are deemed abandoned. E.g., In re Wireless Telephone Federal Cost Recovery Fees Litigation, 396 F.3d 922, 928 (8th Cir. 2005). If plaintiff fails to file an amended complaint within thirty days, the Court will dismiss this action without prejudice.

Accordingly,

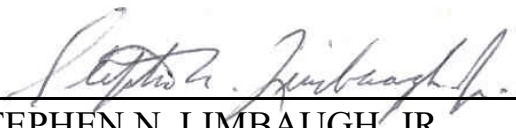
IT IS HEREBY ORDERED that plaintiff’s motion to proceed in forma pauperis [Doc. #2] is **GRANTED**.

IT IS FURTHER ORDERED that the plaintiff shall pay an initial filing fee of \$2.24 within thirty (30) days of the date of this Order. Plaintiff is instructed to make his remittance payable to “Clerk, United States District Court,” and to include upon it: (1) his name; (2) his prison registration number; (3) the case number; and (4) that the remittance is for an original proceeding.

IT IS FURTHER ORDERED that plaintiff shall submit an amended complaint within thirty (30) days of the date of this Memorandum and Order.

IT IS FURTHER ORDERED that the Clerk shall mail to plaintiff a copy of the Court's form Prisoner Civil Rights Complaint.

Dated this 31st day of May, 2011.



STEPHEN N. LIMBAUGH, JR.
UNITED STATES DISTRICT JUDGE